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Nos. 80-1971 and 80-2001

In the Supreme Court of the United States

OCTOBER TERM, 1980

NOBLE R. STARNES, PETITIONER

v.

UNITED STATES OF AMERICA

CLIFFORD ROLAND, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether there was an "enterprise" within the meaning of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1961 *et seq.*

2. Whether three separate and distinct unlawful acts, undertaken to achieve a single overall objective, can constitute a "pattern of racketeering activity" under RICO.

3. Whether the evidence was sufficient to establish petitioners' fraudulent intent.

4. Whether petitioners demonstrated that the Jencks Act (18 U.S.C. 3500) and the Due Process Clause as interpreted in *Brady* v. *Maryland*, 373 U.S. 83 (1963), were violated by the prosecutor's failure to produce rough FBI interview notes of which he was unaware.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 9-23)[1] is reported at 644 F.2d 673. The opinion of the district court (Pet. App. 1-8) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 20, 1981. Petitions for rehearing were denied on April 21, 1981 (Pet. App. 24). The peti-

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[1] "Pet. App." refers to the appendix to the petition in No. 80-2001.

tion for a writ of certiorari in No. 80-1971 was filed on May 21, 1981, and the petition for a writ of certiorari in No. 80-2001 was filed on May 27, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Illinois, petitioners were convicted on one count of conspiracy to conduct or participate in the affairs of an enterprise through a pattern of racketeering activity, in violation of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1962(d) (Count 1). Petitioner Roland was also convicted on one count of interstate travel with intent to carry on or facilitate an unlawful activity, in violation of the Travel Act, 18 U.S.C. 1952(a) (Count 2). Each petitioner was sentenced to a term of six years' imprisonment and a fine of $5,000 on Count 1. In addition, petitioner Roland received a concurrent sentence of five years' imprisonment and a fine of $5,000 on Count 2. The court of appeals unanimously affirmed (Pet. App. 9-23).

The government's evidence at trial is summarized in the opinions below (Pet. App. 4-8, 10-14). In brief, it showed that in December 1977 petitioner Roland contacted co-defendant Gerald Shurman and told him that a friend wanted an office in Illinois set on fire. Roland offered Shurman approximately $2,000 for the job. After Shurman enlisted the aid of co-defendant Donald Murphy, the two men met with petitioner Roland at his tavern in Gary, Indiana, to arrange the details for the arson. During this meeting, petitioner Roland made calls to, and received calls from, a telephone subscribed to by peti-

tioner Starnes. As a result of the meeting, Shurman and Murphy agreed with petitioner Roland to travel to southern Illinois to set the fire (Tr. 135-142, 245-250; Pet. App. 10-11).

The office to be destroyed belonged to Tri-No Enterprises, Inc., an Illinois corporation of which petitioner Starnes was the president. The office was located in a business complex in the town of Herrin in southern Illinois. It was anticipated that the fire would be blamed on the United Mine Workers, who were employed by some of Tri-No's suppliers (but not directly by Tri-No) and were on strike in southern Illinois at the time (Tr. 106-109, 156, 257-258; Pet. App. 5, 11).

On February 19, 1978, petitioner Roland, Shurman, and Murphy travelled in Roland's motor home from Gary, Indiana, to petitioner Starnes' house in southern Illinois. Petitioner Starnes then drove the three men to the office building in Herrin, Illinois. At that point, petitioner Starnes explained that he wanted the entire building destroyed rather than only the particular office. While the other three men prepared for the fire, petitioner Starnes removed various records, office equipment, and lawnmowers from the building. Shurman and Murphy waited until dark before setting the fire, in order to allow petitioner Starnes to leave the state and establish an alibi. The fire caused substantial damage to the building (Tr. 147-148, 150-151, 156-159, 251-254, 257-258, 263-264; Pet. App. 5, 11).

Shortly before the fire, petitioner Starnes had increased his insurance coverage on the building (Tr. 103-104; Pet. App. 6, 11). Additionally, petitioner Starnes had been experiencing financial problems and was unable to pay all of his creditors (Tr. 87, 91; Pet. App. 6, 11-12). Immediately after the fire,

petitioner Starnes filed a claim with his insurance company to recover for the damage (Tr. 115-126; Pet. App. 6, 13).

ARGUMENT

1. Petitioners contend (80-1971 Pet. 10-11; 80-2001 Pet. 12) that RICO was not violated because the statute does not apply to a wholly "illegitimate" enterprise. This claim is without merit. In *United States* v. *Turkette*, No. 80-808 (June 17, 1981), this Court squarely rejected petitioners' argument, holding that RICO encompasses "illegitimate" as well as "legitimate" enterprises. Accordingly, petitioners' characterization of their enterprise as entirely unlawful, even if accurate, does not serve to render RICO inapplicable.[2]

2. Petitioners also contend (80-1971 Pet. 12-16; 80-2001 Pet. 9-13) that a "pattern of racketeering activity" did not exist under RICO (18 U.S.C. 1961(5)) because their several acts of racketeering were part of a single incident of arson. This contention was properly rejected by the courts below (Pet. App. 7, 14-16).[3]

Here, the predicate racketeering activity consisted of arson, in violation of state law (Ill. Ann. Stat. ch. 38, § 20-1(b) (Smith-Hurd 1977)); interstate travel with intent to commit arson, in violation of

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[2] In addition, for the reasons stated by the court of appeals in its alternative holding (Pet. App. 17-18), Tri-No., a legitimate "legal entity" (18 U.S.C. 1961(4)), satisfied the "enterprise" element in this case.

[3] We note that the Court has recently declined to review a similar claim. See *Morelli* v. *United States*, cert. denied, No. 80-1748 (June 29, 1981). Copies of our opposition in *Morelli*, which discusses (at 5) the decision below in the instant case, are being sent to counsel for petitioners.

18 U.S.C. 1952(a)(3); and mail fraud, in violation of 18 U.S.C. 1341. The RICO statute defines "racketeering activity" in terms of "any act" chargeable under specified statutes. See 18 U.S.C. 1961(1); *United States* v. *Turkette, supra,* slip op. 6. That the acts of racketeering in this case were connected by a single overall scheme does not detract in any way from the conclusion that they constitute separate and distinct criminal offenses that together form a pattern of racketeering activity.[4] As the court of appeals correctly explained (Pet. App. 15), "[w]hile there may indeed have been a single scheme or objective of the conspiracy—the arson—it turned out that several acts of racketeering were contemplated to achieve that objective. Under RICO, the conspiratorial *objective* is a matter different than the *acts* contemplated by the conspirators" (emphasis in original). In fact, the acts of racketeering in a RICO case will often be related to a unitary and specific criminal objective, and the exclusion of such situations from RICO, as petitioners urge, would frustrate the broad Congressional purpose to eradicate organized criminal activity. See *United States* v. *Turkette, supra,* slip op. 11-14. Petitioners deliberately planned and committed sev-

[4] For this reason there is no merit to petitioner Roland's suggestion (80-2001 Pet. 10) that his convictions were "unconstitutionally multiple" (*Whalen* v. *United States,* 445 U.S. 684, 688 (1980)) in violation of the Double Jeopardy Clause. Roland was convicted on one count of RICO conspiracy, based upon the racketeering acts of arson, interstate travel to commit arson, and mail fraud, and on one Travel Act count. His convictions in a single prosecution of these two offenses, each of which required proof of a fact that the other did not, do not offend the Double Jeopardy Clause. See *Albernaz* v. *United States,* No. 79-1709 (Mar. 9, 1981); *Iannelli* v. *United States,* 420 U.S. 770, 785 n.17 (1975); *Blockburger* v. *United States,* 284 U.S. 299, 304 (1932).

eral discrete criminal offenses, and this course of criminal conduct satisfied the "pattern" element of RICO. See *United States* v. *Martino*, 648 F.2d 367, 402-403 (5th Cir. 1981); *United States* v. *Weatherspoon*, 581 F.2d 595, 601-602 & n.2 (7th Cir. 1978).[5]

3. Petitioners further argue (80-1971 Pet. 16-23; 80-2001 Pet. 6-9) that the evidence was insufficient to prove the requisite intent to sustain their convictions. Under Illinois law, the destruction of one's own property by means of fire is not arson unless it is done with the intent to defraud an insurer (see Pet. App. 12). Petitioners assert that no fraudulent intent existed at the time the acts were committed, and accordingly that there was neither a Travel Act violation based on the intent to commit arson[6] nor

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[5] The district court decisions cited by petitioners do not require a contrary result. *United States* v. *Chovanec*, 467 F. Supp. 41, 44 (S.D.N.Y. 1979); *United States* v. *Stofsky*, 409 F. Supp. 609, 614 (S.D.N.Y. 1973); and *United States* v. *White*, 386 F. Supp. 882, 883-884 (E.D. Wis. 1974), each supports the view that the acts constituting the pattern of racketeering activity must be interrelated through some common scheme, plan, or motive. In the instant case, the government's proof indisputably established that the three offenses were part of a common scheme with a single objective. *United States* v. *Ladmer*, 429 F. Supp. 1231 (E.D.N.Y. 1977), is inapposite to the question presented here. In that case, the issue was whether the particular kind of activities that established the pattern of racketeering had an effect on the conduct of the union's affairs. The court in no way suggested that conduct like petitioners' could not establish a pattern of racketeering activity.

[6] Only petitioner Roland was convicted on the Travel Act count. Because his sentence on that count was concurrent with his RICO sentence (see Pet. App. 2 n.1), it is unnecessary for the Court to consider the validity of his Travel Act conviction. See, *e.g. Andresen* v. *Maryland*, 427 U.S. 463, 469 n.4 (1976); *Barnes* v. *United States*, 412 U.S. 837, 848 & n.16 (1973).

the predicate acts of arson, mail fraud, or unlawful interstate travel underlying the RICO conspiracy offense.[7]

It is well settled, however, that this Court does "not grant * * * certiorari to review evidence and discuss specific facts" (*United States* v. *Johnston*, 268 U.S. 220, 227 (1925)) or "merely to give the defeated party in the * * * [c]ourt of [a]ppeals another hearing" (*Magnum Co.* v. *Coty*, 262 U.S. 159, 163 (1923)). Here, "[t]he propriety of * * * [the jury's verdict] depended essentially upon an appreciation of the evidence. Having heard it all the trial court concluded that there was not enough in support of * * * petitioners' * * * claims to warrant a finding in their favor and the * * * [c]ourt of [a]ppeals reached the same result." *Houston Oil Co.* v. *Goodrich*, 245 U.S. 440, 441 (1918). In these circumstances, "[t]he issues of fact, contested in a long hearing, are not before us for review. * * * [Petitioners] invite us to reach conclusions * * * contrary to those reached by the two courts below. This we cannot do." *Comstock* v. *Group of Investors*, 335 U.S. 211, 213 (1948). Accordingly, "[i]n view of [the Court's] settled practice of accepting, absent the most exceptional circumstances, factual determinations in which the district court and the court of appeals have concurred," further review of the sufficiency of the evidence is not warranted. *Branti* v. *Finkel*, 445 U.S. 507, 512 n.6 (1980). See

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[7] Petitioners have not challenged the adequacy of the district court's instructions to the jury, which correctly stated the intent standard applicable to the various acts charged in the indictment. See, *e.g.*, Tr. 517-518, 525-526. Based on these instructions, the jury found that the evidence established petitioners' guilt beyond a reasonable doubt.

also, *e.g.*, *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635-636 (1967); *Graver Mfg. Co.* v. *Linde Co.*, 336 U.S. 271, 275 (1949).

In any event, as both lower counts concluded (Pet. App. 6-7, 12-14), the evidence was sufficient to enable the jury to infer the necessary intent. The opinions below adequately describe the evidence at trial, which in brief showed that petitioner Starnes was in need of cash to pay his company's bills; Starnes was aware that the company's building was insured, and he had recently increased the insurance coverage; Starnes procured the services of Roland and others to start a fire at the building; before the fire Starnes instructed them that the building was to be completely destroyed, and he removed several items from the building; and Starnes knowingly submitted a fraudulent claim for the insurance shortly after the fire. The evidence also showed that petitioner Roland and Starnes had been friends long before the arson was contemplated; Roland was in continuous contact with Starnes while the arson was being planned, and he was in charge of the required arrangements; Roland could have expected from his own experience to recognize the likelihood of an insurance recovery for the arson and the tremendous risk of damage that the fire entailed, especially in view of the amount of flammable liquid that was purchased; and a few weeks after the fire Roland told Shurman that full payment would not be forthcoming until the insurance proceeds had been received. While petitioners offered at trial the same exculpatory explanation of the government's evidence that they present in the petitions, the jury clearly found their submission to be unworthy of belief. The government was not "under an affirmative duty to rule out every hypothesis ex-

cept that of guilt beyond a reasonable doubt" (*Jackson* v. *Virginia*, 443 U.S. 307, 326 (1979)), and petitioners have failed to establish a negative answer to the critical question—"whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt" (*id.* at 319; emphasis in original).

4. Lastly, there is no merit to petitioner Starnes' contention (80-1971 Pet. 24-27) that the non-production of rough FBI interview notes violated the Jencks Act, 18 U.S.C. 3500, and *Brady* v. *Maryland*, 373 U.S. 83 (1963).

In his testimony as a government witness, Shurman stated that FBI Agent Little had taken notes during his interviews with Shurman. The information from the notes was incorporated into a formal final report, which was turned over to petitioners. The prosecutor did not have the handwritten notes in his possession and had been unaware of their existence prior to Shurman's testimony. The district court offered to hold a hearing on the defense request for production. However, petitioner Starnes did not pursue that possibility. Nor did Starnes either call Agent Little to the stand to explore the existence and contents of the notes or question the chief FBI agent on the case about the matter after he had been called as a defense witness (Pet. App. 20).

Thus, the defense made no effort to utilize the opportunities available to it to explore the issue of the notes or to demonstrate prejudice from their non-production. Having failed to probe the matter and develop an adequate record in the district court, petitioner Starnes should not now be heard to complain

on the basis of speculation about the existence and exculpatory value of the notes.[8]

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1981

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[8] We also note that at all events the Court has consistently declined to review the question of the preservation and production of rough interview notes. See, *e.g.*, *Delli Paoli* v. *United States*, cert. denied, 444 U.S. 926 (1979); *Shovea* v. *United States*, cert. denied, 440 U.S. 908 (1979); *Vella* v. *United States*, cert. denied, 434 U.S. 1074 (1978); *Harris* v. *United States*, cert. denied, 434 U.S. 986 (1977); *Mehta* v. *United States*, cert. denied, 434 U.S. 965 (1977); *Stebbins* v. *United States*, cert. denied, 434 U.S. 938 (1977); *Chew* v. *United States*, cert. denied, 430 U.S. 918 (1977).

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